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Before the  
**Federal Communications Commission**  
Washington DC 20554

*Docket # 01-109*  
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MAY - 9 2001

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
Extension of the Five-Year Build-Out Period )  
for BTA Authorization Holders in the )  
Multipoint Distribution Service )

DA No. 01-1072

To: The Commission

**COMMENTS OF HUBBARD TRUST**

The Hubbard Trust, by its attorneys, hereby submits these comments with respect to the Commission's proposal to extend the build-out date for MMDS BTA licensees. The Trust is presently the licensee of two relatively rural BTAs, Marion, OH and East Liverpool, OH. Until two years ago, it was also the licensee of a rural BTA in Idaho. As a small, rural BTA holder, the Trust's perspective on the upcoming build-out deadline may be different from those of the larger carriers who have actively lobbied the Commission on this issue.

The Trust strongly supports the Commission's proposal to extend the build-out date for MMDS systems for a number of reasons. First, as the Commission itself recognized in its request for comments, the MMDS regulatory structure has been going through a radical transformation over the very period of time in which the MMDS facilities auctioned in 1995-96 were to be constructed. The Hubbard Trust's principals have literally been involved with the MDS industry since its inception in 1971. While the industry has seen many changes since those early days, none have been as far-reaching as the events of the last five years. Almost as soon as the BTA licenses were granted in 1996, the Commission began considering the Digital

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Declaratory Ruling, which held the promise of a significant expansion of MDS's potential from the traditional analog video model to a new digital paradigm. Once the Digital Declaratory Ruling was issued, the Commission began exploring the broader implications of two-way data transmission over MDS systems. These developments paralleled the financial collapse of most of the larger MDS licensees who had tried to pursue competitive video applications of MDS. The Two-Way proceeding involved an extraordinary level of intra-industry groundwork and extensive cooperation from the Commission to develop useable interference standards for two-way operations. Only after considerable last minute wrangling was a workable industry-agency framework agreed to. In the meantime, all build-out plans for digital MMDS systems were effectively on hold. In the absence of standards, no one could go forward. Even after the two-way rules were adopted, the industry continued to negotiate consensual interference standards which neighboring systems could live with on an on-going basis. Thereafter, it took some time for the first two-way window to open, and then an even longer time for those first applications to be processed. All of these necessary and crucial advancements in the regulatory status of MDS systems made it impossible in a practical sense to implement anything but an analog video system in BTA markets. And, as we have seen, the business model for analog video had proven disastrous.

The ongoing evolution of the regulations governing this industry has had a very concrete effect on the ability of licensees to get *any* kind of system built out. The Trust has found that neighboring licensees have been reluctant or slow to grant interference consents for fear that the rules will change later and they would be foreclosed from future possibilities by having

consented to a specific operational configuration today. In an environment where the rules and interference standards were stable, adjacent licensees would have been much more able to reach voluntary accommodations to permit mutual operations. The on-going uncertainty has made that impossible. Thus, in one market in which the Trust is a minority owner, even the initiation of analog operations has been rendered impossible.

More recently the MDS industry has had to contend with the shadow of a possible reallocation of its entire spectrum as a result of the 3G proceeding. With Docket ET Docket 00258 on a fast track, no sound businessman could see his or her way clear to invest the hundreds of thousands, if not millions, of dollars necessary to build out a digital system when it was entirely possible that the entire investment would be wiped out by reallocation. The Commission could not reasonably expect licensees to risk substantial investment under these circumstances. This cloud will not be lifted until the 3G proceeding is finally put to rest.

Our experience is that in some markets where traditional analog video systems have been installed, the analog equipment will largely have to be abandoned or sold for a fraction of its cost on the secondary market. Again, this prospect has made it economically unjustifiable to go forward and build a system which will be obsolete and virtually valueless almost as soon as it is built.

It bears stressing that the BTA licenses were awarded by auction. Most of the BTA licensees have been dutifully paying their installment payments for their MMDS licenses for the last five years even while the ground rules under which they bought the systems have changed radically – to the point where even their continued ownership of the licenses they bought is in issue. The entire theory of auctioning licenses is that licensees have the economic incentive to

put the licenses to use as way of recouping the market value of their purchases. Economic reality is the strongest incentive for licensees to put their licenses to the most remunerative and most productive use. Here economic reality is the best indicator that it has not been financially viable for licensees to go forward with system build-outs. Had there been any viable way for the BTA licensees to go forward, they would have been incented to put their licenses to use.

In addition, we note that the dust has only recently settled on the first round of two-way applications. It is our sense that the equipment necessary to build out the many systems which need to be built out is nowhere near adequate. Even if the 3G proceeding were resolved tomorrow so that everyone in the industry knew where they stood for the foreseeable future, it would be an impossibility for the equipment manufacturers to deliver the quantity of transmitters and receivers necessary to build out the systems. The effort would be akin to building out an entire microwave infrastructure across the United States in a matter of months rather than a matter of years as originally contemplated. The manufacturing capacity for such a concentrated effort is simply not there. Nor would it have made any sense for manufacturers to have geared up for such an undertaking given the uncertainties which have surrounded the industry for many years.

All of these factors have conjoined to make it virtually impossible for BTA licensees to build out their systems in an economically sensible way over the last few years, despite the embedded investment of having paid for the auctioned licenses. Under these circumstances, it is only fair for the Commission to recognize these unusual circumstances and extend the build-out period by several years. Indeed, given the continuing uncertainties of the 3G proceeding, we believe that a three-year extension would be more appropriate than two years. The strongest incentive

to construct is the amount of money which the licensees have already invested and are continuing to invest in their licenses. Imposition of an artificial, foreshortened deadline can only serve to generate uneconomic construction efforts which bear little relation to the actual needs of the communities at issue. There is no reason why MDS should not be treated, at this point, like LMDS. In that service, the Commission recognized from the outset that a flexible construction plan would best conduce to the maximal utilization of the spectrum. Accordingly, the Commission merely required “substantial service” to be provided within the ten year license term of the licensees. *LMDS Service*, 6 CR 1291 (1997). Similar flexible build-out rules should apply here.

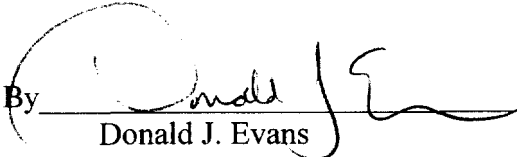
Finally, the Trust requests that the Commission act expeditiously on the present proposal. Because there is only a short time left on both of its licenses, a Herculean effort would be necessary to provide even minimal, unproductive service in the markets before next fall. Thus, the faster the Commission resolves this proceeding, the better.

This would also be a convenient time for the Commission to clarify how section 21.930 of the rules is supposed to work. The rule leaves unclear whether the specified level of coverage must be provided by *all* channels licensed to the BTA holder or to just some of them. (We presume that some would be sufficient.) The rule also leaves unclear how the requirement to serve two-thirds of the population of the BTA unserved by incumbents is to be applied. In most markets, incumbent operators provide coverage to central city areas on one or more MDS channels. The population unserved by the incumbents outside the main cities tends to be rural and sparsely dispersed around the BTA. Taken literally, the rule requires BTA licensees to serve two-thirds of those sparsely populated areas – an enormously expensive undertaking since

the customer base is widely spread out. To illustrate, a typical BTA would have a city like Peoria, IL as the largest city in the market. Peoria and its environs might easily hold 80% of the population of the BTA. Since this population is normally served by an incumbent, under a strict reading of the rule, the BTA licensee would have to serve two-thirds of the remaining 20%. The incumbent can serve its central population from a single location. To serve the widely scattered population outside the main service area, however, the BTA licensee might have to put in as many as six or seven repeaters with very little corresponding revenue. The situation becomes even less tenable if there are multiple incumbents serving more of the population and thus leaving even smaller, more widely scattered population pockets to be picked up by the BTA holder. It is difficult to believe that this was the intent of the rule, but the rule seems to require this on its face. Clarification or amendment of the rule would be helpful.

Respectfully submitted,

THE HUBBARD TRUST

By   
Donald J. Evans

Fletcher, Heald & Hildreth, P.L.C.  
1300 N. 17<sup>th</sup> Street, 11<sup>th</sup> Floor  
Arlington, VA 22209  
703-812-0400

Its Attorney

May 9, 2001

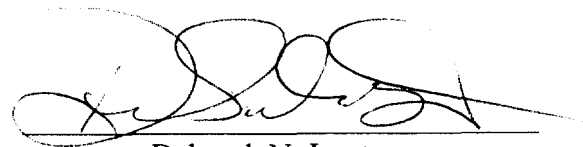
## **CERTIFICATE OF SERVICE**

I, Deborah N. Lunt, a secretary with the law firm of Fletcher, Heald & Hildreth, P.L.C., have caused copies of the foregoing "Comments of Hubbard Trust" to be hand delivered this 9<sup>th</sup> day of May, 2001, to the following:

Brad Lerner  
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Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room 2-A733  
Washington, DC 20554

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Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

A handwritten signature in black ink, appearing to read "Deborah N. Lunt", written over a horizontal line.

Deborah N. Lunt